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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FRANK MARQUEZ, Defendant and Appellant.	F056817 (Super. Ct. No. DF008793A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Kenneth C. Twisselman II, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Brian Alvarez, Deputy Attorneys General, for Plaintiff and Respondent.

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On April 30, 2008, the Kern County District Attorney filed an information in superior court charging appellant Frank Marquez with one count of assault with a deadly weapon in a California correctional institution (Pen. Code, § 4501) with the personal infliction of great bodily injury (§§ 1192.7, subd. (c)(8), 12022.7) and a strike prior (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)).

On May 5, 2008, appellant was arraigned, pleaded not guilty to the substantive count, denied the truth of the special allegations, and requested a jury trial.

On November 19, 2008, jury trial commenced.

On November 24, 2008, the jury returned verdicts finding appellant guilty of the substantive count and finding the great bodily injury allegation to be true. The court then conducted a bifurcated jury trial of the strike prior, and the jury found the special allegation to be true.

On December 23, 2008, the court conducted a sentencing hearing, denied appellant probation, and sentenced him to a total term of 15 years in state prison. The court imposed the upper term of 12 years on the substantive count and a consecutive term of three years for the great bodily injury allegation. The court directed these terms to be served consecutively to the 13-year sentence previously imposed in his voluntary manslaughter case (*People v. Marquez* (Super. Ct. L.A. County, 2003, No. VA066025-04). The court imposed a $20 security fee (Pen. Code, § 1465.8, subd. (a)(1)), imposed a $200 restitution fine (§ 1202.4, subd. (b)), and imposed and suspended a similar such fine pending successful completion of parole (§ 1202.45).

On December 23, 2008, appellant filed a timely notice of appeal.

FACTS

The following facts are taken substantially verbatim from the report of the probation officer filed December 23, 2008:

> "On December 19, 2006, at approximately 11:24 a.m., correctional officers in the Administrative Segregation Unit [of Kern Valley State Prison] heard noise coming from C-Section. An officer responded to investigate the

noise and approached cell 132, which was occupied by [Marquez] … and Angel Vega, the victim. He observed Vega to have slashing wounds over his body. When additional staff responded, the officer ordered both Vega and Marquez to submit to handcuffs and both complied without incident. Vega was subsequently transported to Emergency Services Unit and Marquez was re-housed in a holding cell. [¶] The matter was then referred to the Kern County District Attorney's Office for further investigation."

DISCUSSION

I. Did the Trial Court Err in Failing to Instruct on Reasonable Doubt in a Bifurcated Trial of the Alleged Prior Conviction?

Appellant contends the trial court committed reversible error by giving modified CALJIC No. 17.26 (Jury Duty to Find Prior Felony—Bifurcated Trial [Pen. Code, § 1158, 667, 1170.12, subds. (a)-(d)]) rather than Judicial Council of California Criminal Jury Instructions (2008) CALCRIM Nos. 221 (Reasonable Doubt: Bifurcated Trial) and 3101 (Prior Conviction: Bifurcated Trial [Pen. Code, §§ 1025, 1158]).

Modified CALJIC No. 17.26, as read to the jury at the bifurcated hearing, stated:

"[Appellant] was accused in the Information of having violated Penal Code Section 4501. And the jury has now returned a verdict of guilty as to that particular charge.

"It is also alleged in the Information that [appellant] previously has been convicted of a certain felony, namely a violation of Penal Code Section 192 Subdivision (a) on January 6th, 2003.

"You must now determine the truth of this allegation. In considering this question, you must not be influenced by the previous conviction of Penal Code Section 4501 on which you have already returned a verdict or any evidence received in support of that allegation.

"The People have the burden of proving the truth of this allegation. If you have a reasonable doubt as to whether such alleged prior conviction is true, you must find the allegation to be not true.

"You are instructed that [appellant] is the person whose name appears on the documents admitted to establish the conviction. Include a special finding on that question using a form that will be supplied to you." (Italics added.)

Appellant concedes the foregoing instruction covers the substance of the language set forth in the more recent CALCRIM No. 3101.[1] However, he maintains that CALJIC No. 17.26, which provided an "abbreviated instruction" on burden of proof, fell short of the "mandatory instruction on reasonable doubt articulated in CALCRIM No. 221." CALCRIM No. 221 states:

> "The People are required to prove the allegations beyond a reasonable doubt.
>
> "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the allegation is true. The evidence does not need to eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.
>
> "In deciding whether the People have proved (an/the) allegation beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received during this [phase of the] trial. Unless the evidence proves (an/the) allegation beyond a reasonable doubt, you must find that the allegation has not been proved [and disregard it completely]."

In *People v. Solis* (2001) 90 Cal.App.4th 1002, the Los Angeles Superior Court conducted a bifurcated trial. A jury first convicted Solis of one count of arson and two

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[1]CALCRIM No. 3101 states:

"The People have alleged that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____ <*insert number[s] or description[s] of exhibit[s]*> . You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

"The People allege that the defendant has been convicted of:

"[1.] A violation of _____ <*insert code section[s] alleged*> , on _____ <*insert date*> , in the _____ <*insert name of court*> , Case Number _____ <*insert docket or case number*> (;/.)

"[AND <*Repeat for each prior conviction alleged.*>]

"[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

"You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding."

counts of making terrorist threats. In the bifurcated trial, the jury then found Solis had suffered a prior conviction within the meaning of the three strikes law as well as Penal Code section 667, subdivision (a)(1) and had served a prison term for that conviction (§ 667.5, subd. (b)). Solis appealed, claiming among other things the jury was not adequately instructed about the prosecutor's burden to prove the prior conviction beyond a reasonable doubt. Division Four of the Court of Appeal, Second District, disagreed and affirmed that portion of the judgment. (*People v. Solis*, *supra*, 90 Cal.App.4th at p. 1008.)

When the trial on Solis's prior conviction began, the trial court correctly explained to the jury each of the specific allegations it would be called upon to decide. The trial court then stated: "'The purpose of this separate trial then is to determine whether the prosecution can prove each element of each allegation beyond a reasonable doubt.'" (*People v. Solis*, *supra*, 90 Cal.App.4th at p. 1019.) After a brief trial, the court instructed the jury with CALJIC No. 17.26. Solis argued on appeal the instruction was deficient because the jury was not informed "'that it also must acquit [the defendant] if it had a reasonable doubt ….'" (*People v. Solis*, *supra*, at p. 1020.)

The Second District held the question was whether there was a "reasonable likelihood" the jury understood the charge as Solis asserted—that is, a reasonable likelihood that the jury did not understand the need for proof beyond a reasonable doubt. (*People v. Solis*, *supra*, 90 Cal.App.4th at p. 1020; see also *People v. Mayo* (2006) 140 Cal.App.4th 535, 538-539 [trial court's omission of CALJIC No. 2.90 instruction on reasonable doubt was not federal constitutional error if other instructions, taken as a whole, effectively informed jury that the prosecution had the burden to prove each element of an offense beyond a reasonable doubt].) The appellate court found the jury was correctly instructed at the beginning of the very short trial on the prior conviction. In other words, the jury was aware the prosecutor had the burden of proving beyond a reasonable doubt each specified allegation in regard to the prior conviction. At the close

of trial, the jury was instructed that if it had a reasonable doubt as to whether the People had proven the allegation, it was required to find the allegation not true. No other burden of proof was mentioned in the attorneys' closing arguments. Based on the trial record, it was not reasonably likely the jury failed to recognize that it had to find the truth of the special allegations beyond a reasonable doubt. (*People v. Solis, supra,* 90 Cal.App.4th at p. 1020.)

In the instant case, the court stated at the inception of the hearing on the special allegation:

> "The jury having returned a guilty verdict as to the charge in Count 1, there is now going to be a second phase to this trial. And the second phase will be the issue of an allegation which is also alleged in the Information filed by the District Attorney in this case.
>
> "We previously read to you the allegation the crime charged in Count 1 as well as the allegation that [appellant] personally inflicted great bodily injury upon Angel Vega. You have already made your findings on those.
>
> "I am going to now read an additional allegation. The People are going to be presenting evidence on that. And then the truth or lack of truth as to that allegation, whether it's proven, will be submitted to the jury for its decision.
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> "The Information further alleges as to [appellant] that said person was on or about January 6, 2003, in the Superior Court, County of Los Angeles, State of California, Case No. VA066025-04 convicted of a prior felony offense, to wit: Penal Code Section 192 Subdivision (a), within the meaning of subdivisions (c) through (j) of Penal Code Section 667 and subdivisions (a) through (e) of Penal Code Section 1170.12.
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> "To such allegation [appellant] has entered a denial. *And now the burden is on the People to prove the truth of this allegation beyond a reasonable doubt*." (Italics added.)

After making this introductory statement, counsel waived opening statements, the court received documentary evidence of the prior conviction into evidence (People's exhibit No. 38), and both sides rested. The court then advised:

> "Ladies and Gentlemen of the jury, the evidence through the admitted Exhibit 38 will be all of the evidence you are going to receive in the trial of this issue. I am now going to instruct you on the law that applies to this issue. *And you also are going to be referred back to the other instructions I previously gave to you,* including those that refer to your duties in terms of deliberation, the things you should do with regard to deliberating." (Italics added.)

The court then gave modified CALJIC No. 17.26 and the bailiff confirmed to the court that the printed instructions previously given to the jury were still in the jury room. The prosecutor offered a brief closing argument, defense counsel submitted the matter, and the court gave several closing instructions regarding recordation of the jury's finding on the form of verdict. In so instructing, the court advised the jurors the bailiff was retrieving the written jury instructions, the one-page instruction for the special allegation was going to be added to the previous instruction packet, the new instruction would be numbered in sequence, and the bailiff would bring the entire packet—including the new instruction—back to the jury room.

Here, as in *Solis*, the court correctly instructed the jury that the prosecutor had the burden of proving the truth of the prior conviction allegation beyond a reasonable doubt. At the close of the bifurcated hearing, the court instructed the jury that if it had a reasonable doubt as to whether the People had proven the allegation of the prior conviction, the jury was required to find the allegation not true. The court provided the jurors with a complete packet of instructions, not only CALJIC No. 17.26 but all of the instructions from the trial of the substantive offense. That packet included CALJIC No. 2.90, defining the presumption of innocence, reasonable doubt, and the burden of proof. As respondent points out, appellant did not object to or challenge the admission of People's exhibit No. 38 and did not refute the contents of that exhibit. In view of these facts and circumstances, it is not reasonably likely—indeed, we see no possibility—that the jury misunderstood the applicable burden of proof governing the special allegation.

The trial court did not commit reversible error by giving CALJIC No. 17.26 rather than CALCRIM No. 221.

II. Did the Trial Court Commit Reversible Error by Giving Old CALJIC No. 7.36 Rather Than Current CALCRIM No. 2721?

Appellant contends the trial court committed reversible error by instructing the jury with the older CALJIC Nos. 7.36, 9.00, and 9.01[2] rather than the newer CALCRIM No. 2721[3] approved by the Judicial Council of California.

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[2]CALJIC No. 7.36 (Assault by Prisoner With a Deadly Weapon or by Means of Force Likely to Produce Great Bodily Injury [Pen. Code, § 4501]) as read to the jury states:

"[Appellant] is accused in Counts 1 of having violated section 4501 of the Penal Code, a crime.

"Every person confined in a state prison of this state except when undergoing a life sentence who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is guilty of a violation of Penal Code Section 4501, a crime.

"A deadly weapon is any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce death or great bodily injury.

"Great bodily injury refers to significant or substantial bodily injury or damage. It does not refer to trivial or insignificant injury or moderate harm.

"Actual bodily injury is not a necessary element of the crime. If bodily injury is inflicted, its nature and extent are to be considered in connection with all the evidence in determining whether the means used and the manner in which it was used were likely to produce great bodily injury.

"In order to prove this crime, each of the following elements must be proved: one, a person was assaulted; two, the assault was committed with a deadly weapon or instrument or by means of force likely to produce great bodily injury; and, three, the person who committed the assault was confined in a state prison and not undergoing a life sentence."

CALJIC No. 9.00 (Assault—Defined [Pen. Code, § 240]) as read to the jury states in part:

"In order to prove an assault, each of the following elements must be proved: one, a person willfully and unlawfully committed an act which, by its nature, would probably and directly result in the application of physical force on another person; two, the person committing the act was aware of facts that would lead a reasonable person to realize that as a direct natural and probable result of this act that physical force would be applied to another person; and, three, at the time the act was committed the person committing the act had the present ability to apply physical force to the person of another.

"The word 'willfully' means that the person committing the act did so intentionally. However, an assault does not require an intent to cause injury to another person or an actual awareness of the risk the injury might occur to another person.

"To constitute an assault it is not necessary that any actual injury be inflicted. However, if an injury is inflicted, it may be considered in connection with other evidence in determining whether an assault was committed and, if so, the nature of the assault.

"A willful application of physical force upon the person of another is not unlawful when done in lawful self-defense. The People have the burden to prove that the application of physical force was not in lawful self-defense. If you have a reasonable doubt that the application of physical force was unlawful, you must find [appellant] not guilty."

CALJIC No. 9.01 (Assault—Present Ability to Commit Injury Necessary) as read to the jury states:

"A necessary element of an assault is that the person committing the assault have the present ability to apply physical force to the person of another. This means that at the time of the act which by its nature would probably and directly result in the application of physical force upon the person of another the perpetrator of the act must have the physical means to accomplish that result. If there is this ability, present ability exists even if there is no injury."

3As urged by appellant in the instant case, CALCRIM No. 2721 (Assault by Prisoner [Pen. Code, § 4501]) states in pertinent part:

"'The defendant is charged in Count one with assault with (force likely to produce great bodily injury/a deadly weapon) while serving a state prison sentence in violation of Penal Code section 4501.

"'To prove that the defendant is guilty of this crime, the People must prove that:

"'1 The defendant did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person;

"'2 The defendant did that act willfully;

"'3 When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone;

"'4 When the defendant acted, he had the present ability to apply force (likely to produce great bodily injury/with a deadly weapon) to a person; and

"'5 When he acted, the defendant was confined in a California state prison; and

"'6 The defendant did not act in self-defense.

"'Someone commits an act willfully when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

"'The terms application of force and apply force mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does

Appellant specifically contends he was prejudiced because the older CALJIC instructions "simply failed to convey to the jury a clear and comprehensible statement of the elements of the substantive offense which all must be proven beyond a reasonable doubt." He further asserts:

> "An obvious distinction between the CALJIC instruction given and the currently sanctioned instruction is seen in the way the elements of the offense are set forth to be applied by the jury. CALCRIM No. 2721 lists six separate elements which must be proven. The approved instruction addresses all of the factors which the jurors must find in order to prove the commission of the offense in a single comprehensive statement and makes clear that the defense of self-defense must be negated.
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> "By way of contrast, the CALJIC instruction which was given to the jury sets forth only three elements to the offense which must be proven. A person was assaulted; the assault was committed with a deadly weapon or instrument or by means of force likely to produce great bodily injury; and the person who committed the assault was confined in a state prison. [Citation.] Apparently, we must hope that the jurors piece together the subsequent instructions on assault, as well as grasp that self-defense must be negated, in order to address all of the elements articulated in the sanctioned instruction.
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> "The comparison of these instructions clearly illustrates the intent of the drafters of the CALCRIM instructions in providing comprehensible instructions to the jury that fully and accurately explain the law in a manner that will allow them to perform their duties. Had the jurors been instructed with the language of CALCRIM NO. 2721, we could be assured that a

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not have to cause pain or injury of any kind. The touching can be done indirectly by causing an object to touch the other person. The People are not required to prove that the defendant actually touched someone. No one needs to actually have been injured by defendant's act. But if someone was injured, you may consider that fact, along with all the other evidence, in deciding whether the defendant committed an assault, and if so, what kind of assault it was.

"'A deadly weapon is any object, instrument, or weapon that is inherently deadly or dangerous or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.

"'Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

"'A person is confined in a state prison if he or she is confined in Kern Valley State Prison by an order made according to law.'"

conviction came only after they examined and decided each of the elements of the offense."

California Rules of Court, rule 2.1050 states in pertinent part:

"**(a) Purpose** The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California. The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror.

"**(b) Accuracy** The Judicial Council endorses these instructions for use and makes every effort to ensure that they accurately state existing law. The articulation and interpretation of California law, however, remains within the purview of the Legislature and the courts of review. [¶] … [¶]

"**(e) Use of instructions** Use of the Judicial Council instructions is strongly encouraged. If the latest edition of the jury instructions approved by the Judicial Council contains an instruction applicable to a case and the trial judge determines the jury should be instructed on the subject, it is recommended that the judge use the Judicial Council instruction unless he or she finds that a different instruction would more accurately state the law and be understood by jurors. Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed, or when a Judicial Council instruction cannot be modified to submit the issue properly, the instruction given on that subject should be accurate, brief, understandable, and free from argument."

Generally speaking, a defendant is not entitled to have the jury instructed in any particular terms if the instruction given adequately conveys the correct rule of law. (*People v. Cox* (1991) 53 Cal.3d 618, 674, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) To prevail on a claim that the jury instructions were misleading, the defendant must prove a reasonable likelihood that the jury misunderstood the instructions as a whole. (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 147.) We assume jurors are intelligent persons capable of understanding and correlating all jury instructions given. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1148-1149.)

As to the distinction between the current CALCRIM jury instructions and the older CALJIC jury instructions, Division Eight of the Court of Appeal, Second District, has aptly observed:

> "The Judicial Council's adoption of the CALCRIM instructions did not render any of the CALJIC instructions invalid or 'outdated,' as appellant claims. CALJIC instructions that were legally correct and adequate on December 31, 2005, did not become invalid statements of the law on January 1, 2006. Nor did their wording become inadequate to inform the jury of the relevant legal principles or too confusing to be understood by jurors. The Judicial Council's adoption of the CALCRIM instructions simply meant they are now endorsed and viewed as superior. No statute, rule of court, or case mandates the use of CALCRIM instructions to the exclusion of other valid instructions." (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465-466.)

A comparison of CALJIC Nos. 7.36, 9.00, and 9.01 with CALCRIM No. 2721 reveals the older CALJIC instructions contain all of the topics and elements set forth in CALCRIM No. 2721 with the exception of the concept of self-defense. Nevertheless, the trial court here covered the concept of self-defense in great depth by instructing the jury in CALJIC Nos. 5.30 (Self-Defense Against Assault), 5.50 (Self-Defense—Assailed Person Need Not Retreat), 5.51 (Self-Defense—Actual Danger Not Necessary), 5.52 (Self-Defense—When Danger Ceases), 5.53 (Self-Defense Not an Excuse After Adversary Disabled), and 5.55 (Plea of Self-Defense May Not Be Contrived).

A court must instruct on the general principles of law relevant to the issues in a given case. Such instructions must disclose the principles that are closely and openly connected with the facts and which are necessary for the jury's understanding and deliberation of the case. (*People v. Beeson* (2002) 99 Cal.App.4th 1393, 1401.) The trial court satisfied these standards in the instant case, and reversal for failure to give CALCRIM No. 2721 is not required.

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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HILL, J.